COMMENT

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I

When I first get some time with a new acquaintance, I try to get a sense of the person by asking what she or he does when not doing law, or whatever the job. If asked that question myself, I answer that I enjoy reading classics like the Early Greeks. My favorite classic, though, is *Winnie-the-Pooh*, because Pooh and I have something in common: I am a bear of very little brain.[1] I lack the imagination to see value in thin theorizing. For example, in November 1998, at a conference on judicial independence at the University of Southern California Law School,[2] a law professor raised the key question, "What do we mean by 'judicial independence'?" He proceeded to answer his own question: "Real independence would mean judges with a wide range of life experience. The federal bench contains very few disabled people, Marxists, labor organizers, minorities, or gay and lesbian people." Although this may be true, I lack the imagination to find such a comment helpful in the debate about judicial independence.

My imagination also keeps me from seeing value in trying to solve macro problems like making the media better, a goal at which Professor Carrington's paper aims. True, such a problem is as fundamental as any imaginable—but how much can we do about it? Another fundamental problem is whether to have judicial elections at all, and one of the many strengths of Professor Carrington's paper is that it notes the long-proven unlikelihood of getting rid of judicial elections and emphasizes the need for more work on reducing the problems in judicial elections.

The modern effort to eliminate judicial elections began in 1906 with Roscoe Pound's famous speech, or in 1913 when the American Judicature Society was founded, or in 1914 when Professor Kales proposed what in 1940 became the Missouri Plan. After that ninety-two years of effort, we have eighty-seven percent of state judges facing elections of some type. Furthermore, we have contested elections for fifty-three percent of appellate judges and seventy-seven

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This comment is adapted from Professor Schotland's remarks at the conference at which the papers in this volume were presented. The conference, entitled *Bulwarks of the Republic: Judicial Independence and Accountability in the American System of Justice*, was held in Philadelphia in December 1998.

1. *Cf.* A. A. MILNE, WINNIE-THE-POOH 48 (E.P. Dutton 1960) (1926) ("'What does Crustimoney Proseedcake mean?' said Pooh. 'For I am a Bear of Very Little Brain, and long words Bother me.'").

2. I highly recommend Frances Zemans's valuable paper, *The Accountable Judge: Guardian of Judicial Independence*, S. CAL. L. REV. (forthcoming 1999).

percent of general-jurisdiction trial judges.[3] Given these numbers, one would hardly suspect that more sweat and ink have been spent on getting rid of judicial elections than on any other single subject in the history of American law. My point here is not to discourage anyone who wants to continue the battle, but rather to urge those in the fray to give the appropriate focus to work on judicial election problems where we do have judicial elections.

The greatest current threat to judicial independence is the increasing politicization of judicial elections. They are becoming nastier, noisier, and costlier. Campaign costs have soared in states as diverse as Alabama, California, Kentucky, Michigan, Montana, Ohio, Pennsylvania, Texas, and Wisconsin. Even with retention-only elections—the reform model—two Justices were defeated in 1996 by single-issue groups in Nebraska and Tennessee, and another was defeated in 1992 in Wyoming.

Campaign conduct in many states centers on the "tough on crime" message—and this is not the fault of television. A striking example from the 1998 campaign is the newspaper ad run by a challenger to a trial judge, which stated "'Maximum Marion' Bloss [that is, maximum sentences]: You do the crime, you do the time." At the bottom of this ad, she ran a picture of her opponent. One might wonder, why would a candidate run in her ad a picture of her opponent? Well, the candidate is of a certain type, and her opponent is a candidate of a certain color.

Consider as another example two campaigns twenty years ago in California, where few if any judicial candidates could afford television advertising. One candidate, a law professor at Berkeley, one week before the election—after having campaigned simply as a believer in judicial independence—flooded his county with 100,000 fliers proclaiming, "The Issue is Rape." In other counties, one incumbent's fliers stated that he had "sent more criminals—rapists, murderers, felons—to prison than any other judge in Contra Costa County history;" another incumbent advertised his record as "Over 90% Convicted Criminals Sentenced to Institutions. Over 50% to State Prison. Prison Commitment Rate is More Than Twice the State Average." With such public pronouncements on their commitment to fighting crime, should not such candidates be barred from sitting in criminal cases? After all, "[j]udges are supposed to be *judging* crime not fighting it," said a Nevada Justice recently in dissenting from his court's refusal to disqualify one Justice.[4]

What of practical value will flow from this collection of papers? Nine years ago, I was in Little Rock as part of an American Judicature Society effort to reduce the problems in judicial elections. Thanks to a perfect and packed schedule put together by Arkansas Supreme Court Justice David Newbern, the program could not have been better and those in attendance could not have

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3. AMERICAN BAR ASS'N, REPORT AND RECOMMENDATIONS OF THE TASK FORCE ON LAWYERS' POLITICAL CONTRIBUTIONS, PART TWO, at 3 & n.1, 69-76 (1998).

4. Nevius v. Warden, 944 P.2d 858, 860 (Nev. 1997) (per curiam) (Springer, J., dissenting), *reh'g denied with opinion*, 960 P.2d 805 (Nev. 1998) (per curiam).

been more interested. Unfortunately, absolutely nothing came of that effort, because everyone went away saying, "These things do not happen in Arkansas." The very next year, as if I had been a locust bringing the plague—although there were two unusually good candidates—the state suffered its most disturbing and by far most expensive judicial election campaign ever. So I ask, "What will come out of this conference?"

II

Before I get into reform proposals, I must note two disagreements that I have with Professor Carrington's article. Professor Carrington states that "no state and no foreign country has opted for life tenure. . . . Everyone who has considered the question as an open one has chosen term or age limits."[5] Surely Professor Carrington would agree that this nation's 200-year experience with federal courts leads us to rely on them in special ways, creating as a bedrock necessity that we preserve Article III life tenure. However, the reader of Professor Carrington's article will come away from it and say, "If judicial independence has friends like these, it does not need enemies!"

Second, Professor Carrington seems troubled that courts have gotten into reapportionment—but look where the alternative had put us![6] And at some length, Professor Carrington blasts the California Supreme Court for finding their school finance system unconstitutional.[7] He argues that "values not widely shared by the people . . . were forcibly read into the state's constitution" by the court; it had "pushed the envelope of its political role."[8] As another commentator on Professor Carrington's article said:

> If the focus in defending judicial independence is on how we can best free judges to engage in principled decision-making, it seems off the point to criticize judicial decisions for failing to comport with prevailing political views. . . . [If] the decisions may be considered fair interpretations of the law . . . then the court deserves support. . . .[9]

California was the first state to find unconstitutional a typical system of school financing. Just within Los Angeles County, the district with the highest assessed property value, Beverly Hills, had $50,885 per pupil but the district with the lowest per-pupil allocation had only $3,706[10]—a ratio of fourteen-to-one, almost egalitarian compared to the 700-to-one ratio found later in Texas.[11] While California's decision may have been right or wrong, judicial independence would seem to have no meaning if, where a state's constitution has an

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5. Paul D. Carrington, *Judicial Independence and Democratic Accountability in Highest State Courts*, 61 LAW & CONTEMP. PROBS. 79, 118 (Summer 1998).

6. My article about Justice Brennan in a forthcoming symposium discusses the role of judges in reapportionment controversies. *See* Roy A. Schotland, *in* Symposium, *Remembering a Constitutional Hero: Justice William J. Brennan, Jr.*, 43 N.Y.L. SCH. L. REV. (forthcoming 1999).

7. *See* Carrington, *supra* note 5, at 118.

8. *Id*. at 86, 84.

9. Letter from Natalie Gomez-Velez, Brennan Center for Justice, NYU School of Law, to Paul D. Carrington, Professor, Duke University School of Law 2-3 (Nov. 25, 1998) (on file with author).

10. *See* Serrano v. Priest, 487 P.2d 1241, 1252 n.15 (Cal. 1971).

11. *See* Edgewood Indep. School Dist. v. Kirby, 777 S.W.2d 391, 392 (Tex. 1989).

equal protection clause, that state's courts do not intervene in the face of such egregious inequality. As of December 1998, seventeen state supreme courts have upheld their school financing systems, but fourteen have gone with California, including two that overruled earlier decisions and a third (Idaho) which right now seems likely to overrule. In the years since 1989, however, fewer state supreme courts (five) have upheld their systems than have held their systems unconstitutional (eight).[12] If a state's constitution guarantees a basic education, or guarantees adequate public schools, what is judicial independence for if not to stand up when, as a Harvard law professor put it, educational "institutions in those states were comatose, drifting toward disaster."[13] For example, the courts in Kentucky stood up for constitutional rights, leading former Governor Bert Combs to write that "the news media from San Antonio, Texas to London, England . . . lauded [our] School Reform Law" and "Kentucky was singled out by President Bush as a state that used 'creative thinking' to transform its public schools."[14] After the Arkansas Supreme Court struck down that state's system, the political response was so successful that it made a national reputation for then-Governor William Jefferson Clinton. Whichever way one thinks a court should decide such cases, it is clear neither answer amounts to runaway judicial activism, but—right or wrong—the court's decision is entitled to support as an exercise of judicial independence.

Brown v. Board of Education[15] stated that "education is perhaps the most important function of state and local governments."[16] Is not the whole purpose of judicial independence to uphold the rule of law? Deciding what the law requires is often arguable. But it is not arguable that courts should be able to make such decisions without fear or favor of other officials, powerful interests, or what Professor Carrington calls "political crossfires." This is the essence of judicial independence.

III

How real is "judicial independence" if the judges stand for reelection every two years? Or every four years? The tables in the Appendix display data on judicial term lengths, and demonstrate that these are not hypothetical horrors: Thirty percent of elective trial judges (on courts of general jurisdiction) serve initial terms of four years or shorter. Of elected appellate judges, twenty-eight percent have two-year (or shorter) initial terms, and another four percent have only three or four years.

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12. *See* Peter Enrich, *Leaving Equality Behind: New Directions in School Finance Reform*, 48 VAND. L. REV. 101, 185-94 (1995).

13. Christopher F. Edley, Jr., *Lawyers and Education Reform*, 28 HARV. J. ON LEGIS. 293, 302 (1991).

14. Bert T. Combs, *Creative Constitutional Law: The Kentucky School Reform Law*, 28 HARV. J. ON LEGIS. 367, 367 (1991).

15. 347 U.S. 483 (1954).

16. *Id.* at 493.

The length of subsequent terms are slightly better: Only nineteen percent of all trial judges, and only one percent of appellate judges, have subsequent terms of four-year terms or fewer. However, sixty-two percent of the elected trial judges, and forty-five percent of elected appellate judges, serve subsequent terns of only six years.

Every state, whatever its judicial election system, has one overriding goal: to balance judicial independence and judicial accountability. Unduly short terms, however, do not merely challenge judicial independence—they are inconsistent with it. Opinions will differ on what term length is "unduly short," but I expect a large majority would agree that for judges, a term of six years or fewer is too short.

Shorter judicial terms, moreover, cause more campaign finance problems and more campaign conduct problems. The need to campaign frequently deters many people who would be admirable judges from standing for election, and pushes many of the ablest judges off the bench. Even if the positions are appointive (or elective but almost never contested), short-term positions are inherently less attractive. Term lengths that properly balance independence and accountability will do much to bring able people to the bench and help keep them there.

Changing to reasonable term-lengths, and amending the *Model Code of Judicial Conduct* to include the judicial campaign finance reforms that will be voted upon by the ABA House of Delegates in August 1999,[17] will go far to keep judicial campaigns from becoming noisier, nastier, and costlier than they already are. These reforms will increase judicial independence. As New Jersey's great Chief Justice Arthur T. Vanderbilt often said, "judicial reform is not for the short-winded."

17. The proposals call for (1) more financial disclosure, with particular transparency for lawyers' contributions, (2) limits on all contributions, (3) disqualification from a case (on motion of opposing party) if counsel or a party contributed more than the limits allow, (4) a ban against judges' appointing lawyers who contributed more than the limits allow (except for pro bono appointments and other special situations), (5) the return of post-election surplus campaign funds to contributors or to a public fund (except for prescribed sums kept for office accounts), (6) increasing voter awareness of judicial candidates and reducing the need for campaign fundraising by issuing official "Voter Guides," and (7) encouraging appropriate judicial campaign conduct by establishing unofficial citizen committees for campaign oversight.

APPENDIX[†]

TABLE 1
SUMMARY OF ELECTORAL STATUS OF STATE JUDGES

Judges	Appellate Courts	Trial Courts
Stand for some form of election	1,084 (87%)	7,380 (87%)
Do not stand for some form of election	159 (13%)	1,111 (13%)
Total	1,243 (100%)	8,491 (100%)

TABLE 2
TERM LENGTH FOR ALL STATE APPELLATE JUDGES

Length of term	Appellate Courts*	
	Initial Term	Subsequent Terms
2 years or fewer	305 (25.9%)	—
3-4 years	38 (3.2%)	10 (0.8%)
6 years	346 (29.4%)	510 (44.5%)
7-8 years	151 (12.8%)	194 (16.9%)
10 years	168 (14.3%)	226 (19.7%)
11-15 years	138 (11.7%)	177 (15.4%)
15 years or more	31 (2.6%)	39 (3.4%)

* Not included are New York's intermediate appellate judges, who are appointed from judges who had been elected to the trial courts.

TABLE 3
TERM LENGTH FOR ELECTED APPELLATE JUDGES

Length of term*	Appellate Courts	
	Initial Term	Subsequent Terms
2 years or fewer	305 (28.2%)	—
3-4 years	38 (3.5%)	10 (0.9%)
6 years	332 (30.6%)	486 (44.8%)
7-8 years	89 (8.2%)	171 (15.8%)
10 years	154 (14.2%)	212 (19.6%)
11-15 years	166 (15.3%)	205 (18.9%)

* Of all elected appellate judges, 40.4% (438) are appointed for initial terms of four years of fewer and then face only retention elections.

In all elective systems, a majority of judges initially reach the bench by appointment to vacancies.

[†] Sources: ABA TASK FORCE ON LAWYERS' POLITICAL CONTRIBUTIONS, Part II, 69 (July 1998) (corrected for recategorization of one state); AMERICAN JUDICATURE SOCIETY, JUDICIAL SELECTION IN THE STATES (1998); NATIONAL CENTER FOR STATE COURTS, STATE COURT CASELOAD STATISTICS (1996).

TABLE 4

TERM LENGTH FOR ALL STATE TRIAL COURT (GENERAL JURISDICTION) JUDGES

Length of term	Trial Court of general jurisdiction	
	Initial term	Subsequent terms
2 years or fewer	868 (10.2%)	—
3-4 years	1450 (17.1%)	1506 (18.0%)
6 years	3966 46.7%)	4646 (55.5%)
7-8 years	1134 13.4%)	618 (7.4%)
10 years	408 (4.8%)	408 (4.9%)
11-15 years	538 (6.3%)	814 (9.7%)
15 years or more	127 (1.5%)	372 (4.5%)

TABLE 5

TERM LENGTH FOR ELECTED TRIAL COURT (GENERAL JURISDICTION) JUDGES

Length of term*	Trial Court of general jurisdiction	
	Initial term	Subsequent terms
2 years or fewer	868 (11.76%)	—
3-4 years	1377 (18.66%)	1433 (19.41%)
6 years	3884 (52.63%)	4564 (61.84%)
7-8 years	428 (5.80%)	428 (5.80%)
10 years	366 (4.95%)	366 (4.95%)
11-15 years	457 (6.20%)	589 (8.00%)

* Of all elected trial judges, 13.8% (1019) are appointed for initial terms of four years of fewer and then face only retention elections.

In all elective systems, a majority of judges initially reach the bench by appointment to vacancies.